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United States v. Ross: The Fourth Amendment Takes a Back Seat to the Automobile Exception

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UNITED STATES v. ROSS: THE FOURTH AMENDMENT TAKES A BACK SEAT TO THE AUTOMOBILE EXCEPTION

I. INTRODUCTION

The warrantless search and seizure of an automobile and its contents encompasses the balancing of two often conflicting interests: the individual's legitimate expectation of freedom from unreasonable searches under the fourth amendment and society's desire to effectively combat crime. For more than fifty years, the United States Supreme Court has attempted to balance the interests of both the individual and society in the area of warrantless automobile searches.[1] During this period the Court has frequently struggled to delineate the constitutional parameters of a warrantless intrusion upon a vehicle, its driver, and its contents.[2]

In *United States v. Ross*,[3] the United States Supreme Court[4] extended the authority of law enforcement officers to search all the contents of a lawfully stopped vehicle by eliminating the warrant requirement where officers have probable cause to believe that the vehicle contains contraband. By rejecting the notion that an individual has a reasonable expectation of privacy in containers found in an automobile, the Court eliminated the protection previously provided against warrantless container searches.[5] The Court's concern for effi-

1. The United States Supreme Court initially confronted the legality of a warrantless automobile search in Carroll v. United States, 267 U.S. 132 (1925). For a more detailed discussion of *Carroll*, see *infra* notes 76-81 and accompanying text.

2. For other articles which analyze the Supreme Court's struggle with warantless automobile searches, see Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557 (1982); Note, *Robbins and Belton—Inconsistency and Confusion Continue to Reign Supreme in the Area of Warrantless Vehicle Searches*, 19 HOUS. L. REV. 527 (1982); Note, *Robbins v. California and New York v. Belton: The Supreme Court Opens Car Doors to Container Searches*, 31 AM. U.L. REV. 291 (1982); Comment, *Fourth Amendment—Of Cars, Containers and Confusion*, 72 J. CRIM. L. & CRIMINOLOGY 1171 (1981); Wilson, *The Warrantless Automobile Search: Exception Without Justification*, 32 HASTINGS L.J. 127 (1980).

3. 456 U.S. 798 (1982).

4. Justice Stevens' majority opinion was joined by Chief Justice Burger and Associate Justices Blackmun, Powell, Rehnquist and O'Connor. Justice Blackmun and Justice Powell also filed concurring opinions. Justice Marshall filed a dissenting opinion, in which Justice Brennan joined, and Justice White filed a separate dissenting opinion.

5. The principle that an individual has a constitutionally protected expectation of privacy under the fourth amendment was first recognized in Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) ("[A]n enclosed telephone booth is an area where,

cient law enforcement weighed heavily in its decision to broaden the scope of a warrantless search.[6]

This casenote examines the *Ross* opinion in light of the traditional justifications for warrantless automobile searches and concludes that the case does not logically extend those justifications. It also questions whether the majority's reasoning supports its conclusion that the existence of probable cause to search an automobile justifies the search of containers found in the automobile. Finally, this note discusses the majority's unsatisfactory reconciliation of *Ross* with the holdings in *United States v. Chadwick*[7] and *Arkansas v. Sanders*,[8] which undermined the Court's attempt to clarify the permissive scope of a warrantless automobile search.

II. STATEMENT OF THE CASE

On November 27, 1978, a reliable informant called the District of Columbia Police Department to report that a man known as "Bandit" was selling drugs kept in the trunk of his car parked at 439 Ridge Street.[9] Three policemen, including a Detective Cassidy, drove to 439 Ridge Street where they observed a car matching the description provided by the informant.[10] A radio check revealed that the car was registered to Albert Ross, Jr., whose alias was "Bandit."[11]

The officers drove through the neighborhood twice, spotted Ross driving his car, and stopped him.[12] After instructing Ross to get out of the car, they conducted a search of the car's interior.[13] Upon discovery of a pistol and ammunition inside the car, Ross was arrested and handcuffed.[14] Detective Cassidy then took Ross's keys, opened the trunk, and found a closed but unsealed brown paper bag.[15] Cassidy immediately opened the paper bag and discovered a number of glassine bags

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like a home . . . a person has a constitutionally protected reasonable expectation of privacy . . . ."). The Supreme Court subsequently recognized this protection as applying to containers found in a vehicle. *See* Robbins v. California, 453 U.S. 420 (1981); Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977).

6. *See infra* notes 153-60 and accompanying text.

7. 433 U.S. 1 (1977).

8. 442 U.S. 753 (1979).

9. United States v. Ross, 456 U.S. 798, 800 (1982).

10. *Id.*

11. *Id.*

12. United States v. Ross, 655 F.2d 1159, 1162 (D.C. Cir. 1981) (en banc), *rev'd*, 456 U.S. 798 (1982).

13. *Id.*

14. *Id.*

15. 456 U.S. at 801.

which contained heroin.[16]

The car was subsequently removed to the police station.[17] In the course of a more thorough search of the vehicle, Detective Cassidy found a zippered leather pouch.[18] Unzipping the pouch, he discovered $3,200 in cash.[19] At no point during the entire investigation did the police obtain a search warrant.[20]

A federal grand jury indicted Ross[21] for possession of heroin with intent to distribute.[22] Ross moved to suppress the evidence obtained from the paper bag and the leather pouch, but the district judge denied Ross's motion and he was convicted following a jury trial.[23]

A three-judge panel of the Circuit Court of Appeals for the District of Columbia reversed the conviction, holding that the warrantless search of the paper bag was valid but the search of the leather pouch was not.[24] The entire Court of Appeals then voted to rehear the case sitting en banc and held that the police should not have opened either the paper bag or the leather pouch without first obtaining a warrant.[25] The Supreme Court granted the Government's petition for certiorari and reversed.[26]

III. REASONING OF THE COURT

A. Justice Stevens' Opinion for the Majority

The majority initiated its discussion of *Ross* and the scope of the

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. United States v. Ross, 655 F.2d at 1162.
22. 21 U.S.C. § 841(a) (1976).
23. United States v. Ross, 655 F.2d at 1162.
24. 456 U.S. at 801-02. The Court of Appeals concluded that the police had probable cause to stop and search Ross's car, and that based upon Carroll v. United States, 267 U.S. 132 (1925), and Chambers v. Maroney, 399 U.S. 42 (1970), the officers could conduct a warrantless search of the car, including the trunk. However, on the basis of Arkansas v. Sanders, 442 U.S. 753 (1979), the court invalidated the warrantless search of the leather pouch because Ross possessed a reasonable expectation of privacy in its contents. The court upheld the warrantless search of the paper bag, however, due to the absence of a similar expectation of privacy in its contents. 456 U.S. at 801-02.
25. 456 U.S. at 802. The court refused to recognize a difference between a paper bag and a leather pouch, reasoning that such a distinction "would impose an unreasonable and unmanageable burden on police and courts." 655 F.2d at 1161 (footnote omitted). Moreover, the court interpreted the fourth amendment as a protection for "all persons, not just those with the resources or fastidiousness to place their effects in containers that decisionmakers would rank in the luggage line." *Id.*
26. 456 U.S. at 825.

warrantless automobile search by emphasizing "the importance of striving for clarification in this area of the law."[27] Justice Stevens framed the issue as "the extent to which police officers—who have legitimately stopped an automobile [without a warrant] and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view."[28] The majority held that under such circumstances police may carry out a search that is "as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched.' "[29]

Justice Stevens first explained that the exception to the warrant requirement established in *Carroll v. United States*[30] "applies only to searches of vehicles that are supported by probable cause."[31] He concluded that a search which falls within this exception "is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained."[32]

When probable cause exists for a search, the majority reasoned, prohibiting the opening of containers discovered during the search "could produce absurd results inconsistent with" the holdings of previous automobile search cases.[33] The majority further supported its decision by pointing out that the practical considerations which justify an immediate search, namely the difficulties involved in immobilizing a vehicle while a warrant is obtained, "would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle."[34]

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27. *Id.* at 803.

28. *Id.* at 800.

29. *Id.*

30. 267 U.S. 132 (1925).

31. 456 U.S. at 809.

32. *Id.* (footnote omitted). Applying this test to the facts of *Carroll*, Justice Stevens concluded that the search in *Carroll* was constitutional because "[t]he scope of the search was no greater than a magistrate could have authorized by issuing a warrant based on the probable cause that justified the search." *Id.* at 818.

The *Ross* majority relied heavily on *Carroll* to support its conclusion that the scope of a warrantless automobile search should not vary depending upon the presence or absence of a search warrant. Justice Stevens specifically held that "the scope of the warrantless search authorized by [*Carroll*] is no broader and no narrower than a magistrate could legitimately authorize by warrant." *Id.* at 825. Justice Stevens reasoned that this was especially true because *Carroll* "neither broadened nor limited the scope of a lawful search based on probable cause." *Id.* at 820.

33. *Id.* at 818. The Court was specifically referring to the holdings in Carroll v. United States, 267 U.S. 132 (1925), and Chambers v. Maroney 399 U.S. 42 (1970). For a detailed discussion of these cases, see *infra* notes 76-85 and accompanying text.

34. 456 U.S. at 820. Observing that contraband is almost always placed in a container,

The majority also held that "[t]he practical considerations that justify a warrantless search . . . apply until the entire search of the automobile *and its contents* has been completed."[35] Justice Stevens reasoned that a contrary rule would require the police to search the entire vehicle and then take containers to a magistrate for a warrant, thereby "exacerbat[ing] the intrusion on privacy interests."[36]

The Court reasoned that "the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container."[37] Therefore, since the trunk or glove compartment could be searched without a warrant if probable cause existed, a container in which an individual possesses a similar expectation of privacy should be treated no differently. Thus, the majority concluded that "an individual's expectation of privacy in a vehicle *and its contents* may not survive if probable cause is given to believe that the vehicle is transporting contraband."[38]

The majority attempted to strengthen this conclusion by comparing the container search in *Ross* to a border search, a search incident to arrest, and a search conducted pursuant to a warrant.[39] Justice Stevens suggested that since a person's reasonable expectation of privacy could not prevent an immediate search in these three instances, that same expectation of privacy should not prevent a warrantless search of an automobile and its contents.[40]

The majority emphasized the need for police efficiency and expediency: "When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages . . . must give way to the . . . prompt and efficient completion of the task at hand."[41]

The majority found further support for its views in "the [legal] profession's understanding of the scope" of the warrantless automobile search.[42] Citing to several decisions that upheld warrantless searches of

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the majority argued that drawing a distinction between automobiles and containers served only to frustrate the ability of police to search for contraband while providing offenders with a means of avoiding detection. *Id.*

35. *Id.* at 821 n.28 (emphasis added).

36. Justice Stevens also concluded that "in every case in which a container was found, the vehicle would need to be secured while a warrant was obtained." *Id.*

37. *Id.* at 823.

38. *Id.* (emphasis added).

39. *Id.*

40. *Id.*

41. *Id.* at 821 (footnote omitted).

42. *Id.* at 819.

containers found during lawful automobile searches,[43] Justice Stevens observed that the legality of these searches was apparently taken for granted: "[I]t was not [even] contended that police officers needed a warrant . . . ."[44] The *Ross* majority noted that "[t]hese decisions . . . 'have much weight, as they show that this point neither occurred to the bar or the bench.' "[45] In fact, the Court explained, "prior to the decisions in *Chadwick* and *Sanders*, courts routinely had held that containers and packages found during a legitimate warrantless search of an automobile also could be searched without a warrant."[46]

In an attempt to limit the scope of its ruling, the Court emphasized that a warrantless search is only authorized in those places where there is probable cause to believe that the object of the search may be found.[47] The Court further stated that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab."[48] In *Ross*, however, the police had probable cause to search the entire trunk, not just a particular container within it.[49] Therefore, the Court reasoned, the search was valid because police suspicion did not focus upon a particular container, but rather upon the trunk in general.

Finally, the Court overruled its previous holding in *Robbins v. California*[50] as well as "the portion of the opinion in *Arkansas v. Sanders* on which the plurality in *Robbins* relied."[51] Although the *Ross* Court rejected some of the reasoning in *Sanders*, it upheld its ruling in that case.[52]

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43. *See* Husty v. United States, 282 U.S. 694 (1931) (upholding warrantless search of whiskey bags that could have contained other goods); Scher v. United States, 305 U.S. 251 (1938) (upholding search of 88 bottles of liquor, heavily wrapped in brown paper).

44. 456 U.S. at 819.

45. *Id.* (quoting Bank of the United States v. Deveaux, 5 U.S. (1 Cranch 61, 88 (1809)).

46. 456 U.S. at 819 (footnote omitted).

47. *Id.* at 823-25.

48. *Id.* at 824.

49. "In the case before us, the car trunk, not any identified container in it, was suspected of carrying contraband." United States v. Ross, 655 F.2d at 1167.

50. 453 U.S. 420 (1981) (plurality opinion). For a more detailed discussion of *Robbins*, see *infra* notes 117-19 and accompanying text.

51. 456 U.S. at 824.

52. *Id.* In an earlier portion of the opinion, the majority emphasized that in *Sanders* probable cause to believe that contraband was being transported in a container existed before the container came into contact with the vehicle. *Id.* at 812-14. In addition, the police did not have "probable cause to search the vehicle or anything within it except" the container. *Id.* at 814.

B. The Concurring Opinions

Justice Blackmun concurred in the majority's opinion because he believed it went far to clarify a previously confused area of the law and because it established standards that could be easily applied.[53] Justice Powell, in a separate concurring opinion, agreed.[54] Moreover, Justice Powell noted that the majority's attempt to establish an easily applied and readily understood "bright line" rule was consistent with the similar approach taken in *New York v. Belton.*[55]

Unlike the majority, Justice Powell expressed his belief that "in many situations one's reasonable expectation of privacy may be a decisive factor in a search case."[56] Despite this difference, his belief that the Court should provide specific guidance to police and lower courts led him to concur in the majority's opinion.

C. Justice Marshall's Dissenting Opinion

Justice Marshall, joined by Justice Brennan, wrote a strong dissenting opinion[57] in which he accused the majority of "not only repeal[ing] all realistic limits on warrantless automobile searches, [but of] repeal[ing] the Fourth Amendment warrant requirement itself."[58] Unlike the majority, Justice Marshall articulated the two primary rationales which justify a warrantless automobile search: the exigency created by the mobility of the automobile[59] and the diminished expectation of privacy associated with an automobile.[60] He then explained

53. 456 U.S. at 825 (Blackmun, J., concurring). Justice Blackmun stressed the importance, "not only for the Court as an institution, but also for law enforcement officials and defendants, that the applicable legal rules be clearly established." *Id.*

54. "[I]t is essential to have a Court opinion in *automobile* search cases that provides 'specific guidance to police and courts in this reoccurring situation.' " *Id.* at 826 (Powell, J., concurring) (quoting Robbins v. California, 453 U.S. 420, 435 (1981) (Powell, J., concurring)).

55. 453 U.S. 454 (1981). See *infra* notes 111-15 and accompanying text for a discussion of the *Belton* "bright line" rule.

56. 456 U.S. at 826 (Powell J., concurring).

57. 456 U.S. at 827 (Marshall, J., dissenting). Justice White also dissented, stating that he would affirm the judgment of the Court of Appeals for the District of Columbia, and that he would not overrule *Robbins. Id.* at 826-27 (White, J., dissenting).

58. *Id.* at 827 (Marshall, J., dissenting). Justice Marshall further claimed that "the majority opinion shows contempt for . . . Fourth Amendment values, ignores this Court's precedents, is internally inconsistent and produces anomalous and unjust consequences." *Id.*

59. *Id.* at 830 (Marshall, J., dissenting). For a more detailed discussion of the mobility of the automobile as a rationale for dispensing with a warrant, see *infra* notes 79-91 and accompanying text.

60. *Id.* (Marshall, J., dissenting). For a more detailed discussion of the diminished ex-

that these two traditional justifications do not apply to a container, "which can easily be seized and brought to the magistrate" and which, unlike an automobile, "does not reflect diminished privacy interests."[61]

Justice Marshall criticized the majority's conclusion that practical considerations support the extension of warrantless searches to containers.[62] He reasoned that: (1) a package or personal luggage is easier to seize than an automobile; (2) police might not have to "comb" the entire vehicle to locate the container they seek; and (3) the immediate opening of a container will not always protect the individual's privacy.[63]

Justice Marshall also challenged the majority's reliance on the legal profession's understanding of the scope of the warrantless automobile search[64] and the majority's attempted reconciliation of *Ross* with the holdings in *Chadwick* and *Sanders*. He concluded that the application of *Ross* in light of *Chadwick* and *Sanders* would "create anomalous and unwarranted results."[65]

Justice Marshall asserted that "[t]he only convincing explanation . . . for the majority's broad rule [was] expediency."[66] He rejected this rationale, emphasizing that " 'the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.' "[67]

Relying on the holdings in *Chadwick* and *Sanders*, Justice Mar-

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pectation of privacy as a rationale for a warrantless search, see *infra* notes 92-110 and accompanying text.

61. *Id.* at 832 (Marshall, J., dissenting).

62. *See supra* text accompanying notes 34-36.

63. *Id.* at 838 (Marshall, J., dissenting). Justice Marshall stated:

> [T]he burden to police departments of seizing a package or personal luggage simply does not compare to the burden of seizing and safeguarding automobiles. . . . The search will not always require a "combing" of the entire vehicle, since police may be looking for a particular item and may discover it promptly. If, instead, they are looking more generally for evidence of a crime, the immediate opening of the container will not protect the defendant's privacy; whether or not it contains contraband, the police will continue to search for new evidence.

Id. (citations omitted).

64. *See supra* notes 42-46 and accompanying text. Justice Marshall suggested that this reliance was "an unusual approach to constitutional interpretation," especially because "the [legal] profession formerly advanced different arguments against automobile searches than it advances today." *Id.* at 836 n.7 (Marshall, J., dissenting).

65. *Id.* at 839 (Marshall, J., dissenting). Justice Marshall highlighted these potentially inconsistent consequences by pointing out that a container found when the police had probable cause to search the entire automobile would be treated differently than a container discovered when the police had probable cause to search only that particular item.

66. *Id.* at 841 (Marshall, J., dissenting).

67. *Id.* at 842 (Marshall, J., dissenting) (quoting Mincey v. Arizona, 437 U.S. 385, 393 (1978)).

shall concluded that "any movable container found within an automobile deserves precisely the same degree of Fourth Amendment warrant protection that it would deserve if found at a location outside the automobile."[68] Applying this test to the facts in *Ross*, Justice Marshall concluded that the paper bag and leather pouch could be seized but not opened because "[n]o practical exigencies required the warrantless searches on the street or at the station."[69]

IV. ANALYSIS

A. Background: The Development of the Automobile Exception

The fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[70] In construing this language, the Supreme Court has insisted that "[i]n the ordinary case . . . a search of private property must be both reasonable and pursuant to a properly issued search warrant."[71] Even a search conducted under circumstances that would justify the issuance of a warrant cannot bypass the warrant requirement.[72] The Court's demand that the existence of probable cause justifying a warrant be determined by a "neutral and detached magistrate instead of . . . the officer engaged in the often competitive enterprise of ferreting out crime"[73] reflects its strong conviction that fourth amendment rights are best protected by a separation of powers. The Supreme Court further emphasized the magnitude of fourth amendment rights when it stated that "searches conducted outside the judicial

68. *Id.* at 834 (Marshall, J., dissenting).

69. *Id.* at 835 (Marshall, J., dissenting).

70. The full text of the fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

71. Arkansas v. Sanders, 442 U.S. at 758. *See also* Mincey v. Arizona, 437 U.S. 385, 390 (1978); United States v. United States District Court, 407 U.S. 297, 317 (1972); Katz v. United States, 389 U.S. 347, 357 (1967).

The fourth amendment does not explicitly require the use of a warrant. The warrant requirement is a judicial implementation designed to enforce the fourth amendment prohibition against unreasonable searches and seizures.

72. *See* Agnello v. United States, 269 U.S. 20, 33 (1925) ("Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. . . . [N]otwithstanding facts unquestionably showing probable cause."); United States v. United States District Court, 407 U.S. 297, 317 (1972) (prior judicial approval required for governmental surveillance).

73. Johnson v. United States, 333 U.S. 10, 14 (1948).

process, without prior approval by judge or magistrate, are *per se* unreasonable."[74]

Nonetheless, a warrant is not required in every case. Exceptions to the warrant requirement have been recognized "where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate."[75]

One exception to the warrant requirement is the automobile exception, first identified in *Carroll v. United States*.[76] A warrantless search under this exception was originally justified by the exigency created by the mobility of the automobile,[77] and by the individual's diminished expectation of privacy in the vehicle.[78]

1. The mobility of the automobile

In *Carroll*, the exigency created by the mobility of the automobile prompted the Supreme Court to uphold the warrantless search of an automobile's interior compartment where police had probable cause to believe the vehicle was transporting contraband.[79] The federal agents who conducted the search for contraband in *Carroll* could not arrest the defendants because the agents lacked a warrant and because the defendants' crime was a misdemeanor not performed in the agents' presence.[80] The only choices, therefore, were to let the car and the occupants go, thereby losing the evidence, or to conduct a warrantless search. In upholding the warrantless search, the Court stated that a search of an automobile is permissible since "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the

74. Katz v. United States, 389 U.S. 347, 357 (1967).

75. Arkansas v. Sanders, 442 U.S. at 759.

76. 267 U.S. 132 (1925). The Court has also recognized other exceptions to the warrant requirement. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (voluntary consent); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view); Chimel v. California, 395 U.S. 752 (1969) (search incident to a lawful arrest); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit).

77. *See* Carroll v. United States, 267 U.S. 132 (1925); Chambers v. Maroney, 399 U.S. 42 (1970); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion).

78. *See* Cardwell v. Lewis, 417 U.S. 583 (1974); Cady v. Dombrowski, 413 U.S. 433 (1973).

79. 267 U.S. at 162. In *Carroll*, federal prohibition agents stopped an Oldsmobile Roadster driven by two suspected bootleggers, Carroll and Kiro. Both had previously agreed to sell illegal liquor to the agents who stopped the vehicle. While searching the car, the agents tore open the seat cushion and discovered 68 bottles of gin and whiskey. Both agents believed the defendants were transporting liquor when they stopped the car. *Id.* at 134-36.

80. *Id.* at 156-58.

locality or jurisdiction in which the warrant must be sought."[81]

The Supreme Court significantly altered this rationale in *Chambers v. Maroney*[82] by permitting a warrantless search at the police station, long after the automobile containing contraband had been immobilized.[83] Justice White rejected the argument that only the immobilization of the car should be allowed until a search warrant is obtained.[84] In essence, the Court permitted a search at the station because a search would have been permissible on the highway.[85] The Court's holding overlooked the fact that the mobility rationale which originally permitted the search did not justify a search at the station once the vehicle had been immobilized.

In *Coolidge v. New Hampshire*,[86] a plurality of the Supreme Court retreated from the *Chambers* reasoning, refusing to apply the mobility doctrine to validate the warrantless search and seizure of an unoccupied vehicle that had been seized by police in the suspect's driveway.[87] The plurality argued that it was not the mobility of the automobile which justified an immediate search, but rather the *exigency* created by its mobility.[88] Thus, the *Coolidge* Court properly recognized that the

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81. *Id.* at 153. Chief Justice Taft, writing for the majority in *Carroll*, also recognized "a difference . . . as to the necessity for a search warrant between goods . . . concealed in a dwelling house . . . and like goods in course of transportation and concealed in a movable vessel." *Id.* at 151. This distinction permitted future automobile cases to rely on the holding in *Carroll* without affecting the constitutional limitations associated with the search of a home.

82. 399 U.S. 42 (1970).

83. *Chambers* involved the arrest of four suspects who were riding in a vehicle which matched the description of a car previously used in the robbery of a service station. Police officers seized the vehicle and drove it to the police station. At the station, the police conducted a warrantless search, finding two .38-caliber revolvers and certain cards identifying the service station attendant who had been robbed at gun point.

84. 399 U.S. at 52. "[W]e see no difference between . . . seizing and holding a car before presenting the probable cause issue to a magistrate and . . . carrying out an immediate search without a warrant."

85. "[T]here is little to choose in terms of practical consequences between an immediate search [at the station] without a warrant and the car's immobilization until a warrant is obtained." *Id.*

86. 403 U.S. 443 (1971) (plurality opinion).

87. *Id.* at 460-63. Police searched and vacuumed the vehicle two days after it was seized, and attempted to introduce evidence discovered during the search. *Id.* at 448.

88. The *Coolidge* plurality reasoned:

> [S]urely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll v. United States*—no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence. . . . In short, by no possible stretch of the legal imagination can this be made into a case where "it is not practicable to secure a warrant," . . . and the "automobile exception," despite its label, is simply irrelevant.

mobility doctrine identified in *Carroll* was intended to prevent the loss of evidence occasioned by the failure to conduct an *immediate* search.

In *Texas v. White*,[89] however, the Supreme Court apparently abandoned the notion that police officers must fear the loss or destruction of evidence before they may conduct a warrantless search. Relying on *Chambers*, the *White* Court upheld the warrantless search of a vehicle which had been immobilized at the police station because the police had probable cause to search the vehicle at the scene of the crime.[90] Thus, contrary to the holdings in *Carroll* and *Coolidge*, the *White* Court apparently concluded that it is not the potential exigency created by the mobility of the automobile which justifies a warrantless search, but merely the mobility of the automobile itself.

Although the Supreme Court has not explicitly overruled *Coolidge*, its continued vitality is doubtful in light of the *White* Court's failure to require exigent circumstances before a warrantless search may be conducted. The *White* decision therefore appears to affirm the reasoning of *Chambers*.[91] The fear of loss or destruction of evidence, which originally justified the mobility doctrine, is no longer needed to support a warrantless search.

2. The diminished expectation of privacy rationale

The second traditional rationale for dispensing with a warrant under the automobile exception is the diminished expectation of privacy associated with a vehicle. This rationale stems from the Supreme Court's pronouncement in *Katz v. United States*[92] that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[93] The Court has applied the rationale of *Katz* to automobiles, identifying three theories which support a diminished expectation of privacy in a vehicle. These are: (1) that vehicles are subject to extensive governmental regulation;[94] (2) that their primary function is to transport passengers and not to serve as a repository of personal effects;[95] and (3) that the occupants of

403 U.S. at 462 (quoting Carroll v. United States, 267 U.S. at 153) (footnote omitted).

89. 423 U.S. 67 (1975) (per curiam).

90. *Id.*

91. *See supra* notes 82-85 and accompanying text.

92. 389 U.S. 347 (1967).

93. *Id.* at 351.

94. *See* South Dakota v. Opperman, 428 U.S. 364, 367-68 (1976).

95. *See* Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

a vehicle and some of its contents are subject to public view.[96]

In *South Dakota v. Opperman*,[97] the Supreme Court noted that the extensive governmental regulation of automobiles indicated a diminished expectation of privacy in vehicles generally.[98] Therefore, Chief Justice Burger upheld the warrantless search of an impounded automobile because "the conduct of the police," in light of the diminished expectation of privacy associated with automobiles, "was not 'unreasonable' under the Fourth Amendment."[99]

In *Cardwell v. Lewis*,[100] the Court focused on both the transportational qualities of the car and the exposure of its occupants and contents to public view.[101] Justice Blackmun concluded that these factors demonstrated a diminished expectation of privacy sufficient to justify the warrantless examination of the exterior of a car towed from a parking lot to a police impound lot.[102]

The emergence of the diminished expectation of privacy rationale expanded the scope of the automobile exception. The presumption of an inherent diminished expectation of privacy in a vehicle permitted warrantless searches which could not satisfy the mobility test of *Carroll*. The Supreme Court approved this interpretation in *Cady v. Dombrowski*,[103] noting that "warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not non-existent."[104]

Although the Supreme Court was willing to allow the warrantless search and seizure of an automobile based on the diminished expectation of privacy rationale, it has declined to apply a similar standard to containers found in automobiles. In *United States v. Chadwick*,[105] the

96. *Id.* For an application of the diminished expectation of privacy rationale to the facts in *Ross*, see *infra* notes 123-28 and accompanying text.

97. 428 U.S. 364 (1976).

98. *Id.* at 367-68. "[T]he expectation of privacy with respect to one's automobile is significantly less than that relating to one's home . . . . Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation . . . ."

99. *Id.* at 376.

100. 417 U.S. 583 (1974).

101. "[A] motor vehicle['s] . . . function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Id.* at 590.

102. *Id.* at 592.

103. 413 U.S. 433 (1973).

104. *Id.* at 441-42. (citing Harris v. United States, 390 U.S. 234 (1968); Cooper v. California, 386 U.S. 58 (1967)).

105. 433 U.S. 1 (1976).

Court invalidated the warrantless search of a footlocker seized from the trunk of an automobile.[106] Chief Justice Burger explained that the diminished expectation of privacy in an automobile, which justifies a warrantless search, simply did not apply to the defendant's footlocker.[107] The Court's holding established the principle that an individual's reasonable expectation of privacy in a container could not be violated by a warrantless search, absent compelling circumstances.

Arkansas v. Sanders[108] involved a similar factual situation.[109] The *Sanders* Court refused to apply the automobile exception to containers found within a lawfully stopped vehicle. The Court held that "the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations."[110] As in *Chadwick*, the greater expectation of privacy in luggage combined with the absence of any exigent circumstances persuaded the majority to conclude that the automobile exception could not be extended to this setting.

3. The *Robbins—Belton* dilemma

The difficulty in defining the precise scope of the automobile exception is to an extent the result of the incongruous holdings announced in *New York v. Belton*[111] and *Robbins v. California*.[112] In

106. Police in *Chadwick* had probable cause to believe that a footlocker arriving by train from San Diego contained marijuana. Police arrested the defendant after he claimed the footlocker and placed it in the trunk of his car. Agents later searched the footlocker without a warrant at the Federal Building in Boston. *Id.* at 3-4.

107. The Chief Justice reasoned that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile." *Id.* at 13.

The Chief Justice also rejected the Government's argument that the warrant clause of the fourth amendment protects only those interests connected with the home. *Id.* at 7. Thus, by placing his belongings inside a double-locked footlocker, the defendant displayed a significant desire to keep his possessions away from public scrutiny. The mere presence of the defendant outside the confines of his home could not justify a warrantless search under these particular circumstances.

108. 442 U.S. 753 (1979).

109. In *Sanders*, police had probable cause to believe that the defendant, who was disembarking from a plane, was transporting marijuana inside a green suitcase. Police followed the suspect who placed the suitcase in the trunk of a taxi and drove away from the airport. Several blocks from the airport the police stopped the taxi, opened the trunk and then opened the suitcase without procuring a search warrant. Police discovered 9.3 pounds of marijuana inside the suitcase. *Id.* at 755.

110. *Id.* at 766. The *Sanders* Court limited the scope of its holding by noting that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers . . . by their very nature cannot support any reasonable expectation of privacy . . . ." *Id.* at 764 n.13.

111. 453 U.S. 454 (1981).

112. 453 U.S. 420 (1981) (plurality opinion).

Belton, the Supreme Court permitted the warrantless search of the zippered pocket of a jacket found in the interior of a vehicle whose occupants had already been removed and arrested.[113] Writing for a majority of the Court, Justice Stewart ruled that the police may search the passenger compartment of an automobile and any containers found therein, if the search was incident to the lawful custodial arrest of someone who occupied the automobile just prior to the arrest.[114] The creation of such a "bright line" rule was principally motivated by the majority's desire "to establish the workable rule this category of cases requires ."[115]

The search incident to arrest doctrine defined in *Belton* paved the way for police to search any container found within the interior compartment of the vehicle. The scope of the *Belton* decision greatly expanded the power of police to search because it is almost always easier to establish probable cause for a custodial arrest than to establish probable cause sufficient to satisfy a magistrate.[116]

The permissive scope of *Belton* was indeed surprising considering the restrictive holding announced in *Robbins*[117] the same day. In *Robbins*, a plurality refused to apply the automobile exception to a container found within a vehicle, even though there was probable cause to search the entire vehicle, and not just a particular container.[118] The plurality based its decision on two key assumptions: (1) the diminished expectation of privacy that justifies a warrantless search of an automobile does not extend to containers found within the car; and (2) for purposes of the fourth amendment, no distinction between types of containers should be made so as to provide varying degrees of

113. 453 U.S. at 462-63.

114. *Id.* at 460. Justice Stewart reasoned that "[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *Id.* at 459-60.

115. *Id.* at 460. The *Belton* Court's decision created a "bright line" rule because it permitted the police to search *any* container found in the passenger compartment during a lawful custodial arrest. Prior to *Belton*, the police were limited to a search of the "arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763 (1969).

116. 2 W. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 511-12 (1978). "Usually, it [is] far easier to show grounds to arrest the driver for some past or present offense and then . . . justify the search as incident thereto than to show a present probability as to the location of specific objects in the car . . . ." *Id.*

117. 453 U.S. 420 (1981) (plurality opinion).

118. *Robbins* was the first case decided by the Supreme Court in which the police opened a container found in the trunk, after having probable cause to search the *entire* vehicle.

protection.[119]

The inconsistency of the two decisions is graphically illustrated by the often recurring situation in which probable cause to search the automobile is accompanied by the right to make a custodial arrest. Under *Belton*, the search of a container found in the automobile would be justified as incident to arrest, even in the absence of exigent circumstances, whereas *Robbins* would prevent the search of the identical container.

The presence of a mere plurality in *Robbins*, a change in the constituency of the Court,[120] the apparent inconsistencies between *Belton* and *Robbins*, and the persistent confusion regarding the scope of a warrantless automobile search were all important factors in the *Ross* Court's reconsideration and reversal of *Robbins*. An examination of the traditional justifications for the automobile exception as applied to *Ross* is an appropriate starting point for a critical evaluation of the *Ross* majority's reasoning.

B. The Traditional Justifications for the Automobile Exception as Applied to Ross

The majority did not analyze *Ross* according to the traditional justifications for the automobile exception. This failure may have demonstrated its dissatisfaction with those rationales. In any event, the traditional justifications do not support the use of the automobile exception in *Ross.*

First, the exigency created by the automobile's mobility, which justified the search in *Carroll*,[121] simply cannot support the warrantless search of the paper bag and leather pouch in *Ross*. Both containers could easily have been seized and brought to a magistrate for the issuance of a warrant before being searched. In addition, both containers were under the exclusive control of the police and any arguably mobile characteristics they might have possessed could not justify their immediate search.[122] Moreover, Ross was already under arrest when the police searched the paper bag and leather pouch. Therefore, Ross's

119. 453 U.S. at 424-27.

120. Justice O'Connor replaced Justice Stewart, the author of the plurality opinion in *Robbins*.

121. *See supra* notes 79-81 and accompanying text.

122. In *Chadwick*, the Supreme Court specifically rejected the Government's argument that the mobility of containers in general could justify a warrantless search under the automobile exception. 433 U.S. at 13.

mobility did not present the police with the problem of detaining him while they were obtaining a search warrant.

Similarly, the three rationales which support a diminished expectation of privacy in an automobile[123] do not support the conclusion that Ross had a diminished expectation of privacy in the items searched. First, the contention that because "[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation"[124] their owners have a diminished expectation of privacy in them, does not explain a diminished expectation of privacy in containers locked inside an automobile trunk. The kind of governmental regulation associated with vehicles generally involves "examin[ing] vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order."[125] These regulations, which authorize vehicle inspections to assure conformity with established safety standards, do not generally authorize wholesale searches of automobiles. Therefore, they do not demonstrate that there is a lesser expectation of privacy associated with containers locked inside an automobile trunk.

The second rationale for a diminished expectation of privacy in an automobile, that an automobile's primary function is to transport its occupants, not to serve as a repository for their personal effects,[126] seems similarly inapplicable to *Ross*. Although a vehicle may be classified primarily as an instrument of transportation, the trunk arguably is an exception to this general classification. Containers secured within a trunk, as in *Ross*, may well be as closely associated with the vehicle's function as a repository for personal effects as with its transportational function.[127]

The third rationale, that a car "travels public thoroughfares where both its occupants and its contents are in plain view"[128] also does not

123. *See supra* text accompanying notes 94-96.

124. *See supra* note 98.

125. South Dakota v. Opperman, 428 U.S. at 368.

126. *See supra* note 101.

127. Automobiles are vehicles of transportation which transport not only persons but also belongings. Not uncommonly, they are used as temporary repositories of personal effects: they store the suit or dress that one keeps forgetting to leave at the cleaners, the bank statement that should be brought inside the house, the library book that should be returned, the briefcase that will be needed at a subsequent meeting, the work one had planned to do overnight, and various other personal effects.

Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 637 (1982).

128. *See supra* note 101.

apply to *Ross*. The reduced expectation of privacy associated with a vehicle's occupants and those items which are in plain view does not explain why an individual should have a lessened expectation of privacy in items deliberately concealed from view. Surely Ross exhibited a greater expectation of privacy by placing the paper bag and leather pouch inside the trunk than by exposing them to public view in the interior of the car.

Although the *Ross* majority did not apply the traditional justifications for the automobile exception enunciated in *Carroll* and subsequent decisions, it did rely on *Carroll* to determine the boundaries of a warrantless search.[129] The *Ross* majority's interpretation of *Carroll*,[130] however, overlooked one of the major reasons why the *Carroll* search was constitutional: not only did the officers have sufficient probable cause to satisfy a magistrate, but the mobility of the automobile also created exigent circumstances. *Ross* did not involve exigent circumstances. The leather pouch and paper bag could easily have been seized, and Ross, unlike the suspects in *Carroll*, was already under arrest. Because only half the rationale for *Carroll*'s exception to the warrant requirement was present in *Ross*, the majority's reliance on *Carroll* was unwarranted.

The majority's conclusion that *Carroll* did not limit the scope of a warrantless search[131] suggests that the holding in *Carroll* did not contemplate well-defined limits on a warrantless search. This is not necessarily true. As the Court explained in *Chambers v. Maroney*,[132] "[n]either *Carroll* . . . nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords."[133] The *Ross* majority found in *Carroll* justification for expanding the scope of warrantless automobile searches without properly assessing the facts and reasoning of *Carroll*.

C. Practicality—An Unpersuasive Argument

The *Ross* majority also based its decision on the belief that the practical considerations which justify an immediate search would be nullified if containers were treated differently than automobiles.[134]

129. *See supra* note 32.
130. *Id.*
131. *Id.*
132. 399 U.S. 42 (1970).
133. *Id.* at 50.
134. *See supra* note 34 and accompanying text.

This argument is persuasive only if the practicalities involved in seizing a container are similar to those involved in seizing a vehicle.[135]

The majority, however, professed to find differences between the two types of seizure, noting that "[a] temporary seizure of a package or piece of luggage often may be accomplished without as significant an intrusion upon the individual—and without as great a burden on the police—as in the case of the seizure of an automobile."[136] The inconsistency embodied in the recognition of a practical difference between the seizure of a container and the seizure of an automobile undermines the majority's argument that the practical consequences which justify a warrantless search would be nullified if containers could not be opened immediately.

The argument that the practical considerations that justify an immediate search apply until the vehicle and all its contents have been searched[137] is similarly unpersuasive. First, the police may be looking for a particular item which could be discovered quickly without the opening of containers. In this case, no practical considerations dictate a further search through the vehicle's contents. Likewise, if the police are merely conducting a general search for evidence, they may continue to intrude upon the suspect's privacy interests by searching the entire vehicle, even after searching all containers. Thirdly, allowing an immediate search for fear of "exacerbat[ing] the intrusion"[138] upon the individual's privacy interests deprives that individual of the opportunity to determine which action he considers more or less intrusive.[139]

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135. The practical problems involved in seizing a vehicle while police officers obtain a warrant support an immediate search. *See* Carroll v. United States, 267 U.S. at 153 (immediate search permissible where not practical to obtain warrant).

Judge Wilkey, a dissenter in the *Ross* decision at the court of appeals level, argued that there is little practical difference between obtaining a warrant to search a car and obtaining a warrant to search a container.

> When a warrant is required before a container is opened, the investigating officer must stop the car, search it for containers capable of concealing contraband, seize the containers and arrest the driver, secure the car, transport the driver to a secure location, and then obtain a warrant. When a warrant is required before an auto is searched . . . nothing is changed except that the officer also is required to secure the evidence that might be within the car against the possibility of tampering . . . .

United States v. Ross, 655 F.2d 1159, 1200 (D.C. Cir. 1981) (en banc) (Wilkey, J., dissenting), *rev'd*, 456 U.S. 798 (1982).

136. 456 U.S. at 812 n.16.

137. *See supra* notes 35-36 and accompanying text.

138. 456 U.S. at 821 n.28. *See supra* text accompanying note 36.

139. If the Court were truly concerned with the intrusion upon the suspect, it would permit the person best able to evaluate the infringement on privacy to decide whether he or she would prefer an immediate search or a search at the station pursuant to a warrant.

Judge Wilkey asserted that permitting a suspect to choose between an immediate search or a temporary detention and a search at the station is a "cruel choice" which creates an

More importantly, such reasoning undermines the basic principle that fourth amendment rights are best protected through prior review by a detached and neutral magistrate.[140] Finally, Justice Stevens' conclusion that a search of a container will always necessitate an impoundment of the vehicle[141] overlooks the possibility that the suspect will consent to the search in order to avoid the inconvenience of a temporary detention.

D. Elimination of the Individual's Reasonable Expectation of Privacy in Containers

The *Ross* decision effectively eliminated the individual's reasonable expectation of privacy in containers found during the course of a lawful vehicle search. This expectation of privacy had previously shielded containers from warrantless searches in *Chadwick*, *Sanders*, and *Robbins*.[142] The reasoning by which the majority rejected this fourth amendment protection is unpersuasive.

Justice Stevens' argument that containers should be subject to warrantless searches because trunks and glove compartments are subject to such searches[143] is appealing; it appears inconsistent to permit an of-

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atmosphere conducive to obtaining a forced consent from the suspect. 655 F.2d at 1198-99 (Wilkey, J., dissenting). Despite this possibility, a suspect's privacy interests receive greater protection if he is given a choice, rather than if the choice is made for him.

140. "[T]he whole point of the [warrant requirement] . . . is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the 'competitive enterprise' that must rightly engage their single-minded attention." Coolidge v. New Hampshire, 403 U.S. at 450 (citation and explanatory footnote omitted).

> It has also been observed that:
>
> The warrant process . . . "interposes an orderly procedure" involving "judicial impartiality" whereby a "neutral and detached magistrate" can make "informed and deliberate determinations" on the issue of probable cause. . . . [A] significant part of the protection which flows from the warrant process stems from the fact that the critical probable cause decision is being made by a person possessing certain attributes and acting in a certain way.

2 W. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 29 (1978) (footnotes omitted).

> The individual realizes additional benefits through the warrant process because:
>
> Once a lawful search has begun, it is . . . far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization . . . . Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.

United States v. Chadwick, 433 U.S. 1, 9 (1977) (citing Camara v. Municipal Court, 387 U.S. 523, 532 (1967)).

141. *See supra* note 36.

142. *See supra* notes 105-10 & 118-19 and accompanying text.

143. *See supra* text accompanying notes 37-38.

ficer to break open a locked glove compartment or tear open the upholstery, as in *Carroll*, yet deny him the right to open a package. The Supreme Court, however, has previously emphasized that a vehicle exhibits a diminished expectation of privacy whereas a container does not.[144] In addition, the exigency created by the automobile's mobility justified the extensive search of the upholstery in *Carroll*, regardless of Carroll's expectation that the upholstery would not be torn open. Because no exigency complicated the *Ross* facts, Ross's legitimate expectation of privacy in his containers should have been respected.

The majority's analogy to border searches, searches incident to arrest, and searches pursuant to a warrant[145] likewise fails to support its conclusion that the individual's expectation of privacy in containers cannot survive as long as there is probable cause to believe the vehicle contains contraband. These three types of searches are justified by considerations not present in the *Ross* container searches.

A border search enables officials to search containers without a warrant and even without probable cause.[146] These searches are permitted because they realistically are the only way in which the Government can prevent the flow of contraband into the country.[147] As the Court remarked in *Carroll*, "[t]ravelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully

144. *See* United States v. Chadwick, 433 U.S. 1, 13 (1977) ("a person's expectations of privacy in personal luggage are substantially greater than in an automobile"); Arkansas v. Sanders, 442 U.S. 753, 765 (1979) ("[T]he reasons for not requiring a warrant for the search of an automobile do not apply to searches of personal luggage taken by police from automobiles").

145. *See supra* text accompanying notes 39-40.

146. Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself.

United States v. Ramsey, 431 U.S. 606, 619 (1977) (footnote omitted) (upholding warrantless search without probable cause of incoming international mail).

147. The purpose of [border] inspections—to identify citizenship, collect payment on dutiable goods, and prevent the importation of contraband—would be almost completely frustrated by the confines of a search warrant predicated on a showing of probable cause. Every year a large volume of people and goods must be easily and rapidly processed through customs and immigration stations at numerous points of entry. . . . In the absence, therefore, of a broad power of search at the border, officials would commonly have to rely on the cooperation of those they question.

Ittig, *The Rites of Passage: Border Searches and the Fourth Amendment*, 40 TENN. L. REV. 329, 331 (1973).

brought in."[148] Thus, national self interest and the possibility of permanently losing control over contraband permit an immediate warrantless search regardless of the individual's expectation of privacy.

A search incident to arrest also entails valid policy reasons that justify the immediate warrantless search of containers. These justifications include protecting police officers from concealed weapons that are readily accessible to the suspect and preventing the destruction of evidence by the accused.[149]

A search pursuant to a warrant also justifiably overcomes an individual's desire to prevent the opening of a container. By obtaining a warrant from a neutral and detached magistrate, police officers conform to the societal mechanism which seeks to protect the individual from unreasonable searches under the fourth amendment.[150]

That an individual's expectation of privacy does not prevent a search in these three situations, however, does not support the argument that a person's expectation of privacy must yield to container searches like those upheld in *Ross*. In *Ross*, there were no exigent circumstances,[151] national self-protection was not at issue, and the possibility of the destruction of evidence was remote because Ross was under arrest and handcuffed when the police officers searched the paper bag and leather pouch.[152]

E. The New Justification for the Automobile Exception: Expediency

The majority's refusal to apply the traditional justifications for the automobile exception and the failure of these justifications, when applied, to support the warrantless search of containers found in the vehicle, suggest that the real rationale underlying the *Ross* opinion was expediency. This rationale emerges at several points in the majority opinion, most notably the majority's explanation for its refusal to draw a distinction between the expectation of privacy in packages and in in-

148. 267 U.S. at 154.

149. [A] lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area. Such searches have long been considered valid because of the need "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the concealment or destruction of evidence.

New York v. Belton, 453 U.S. 454, 457 (1981) (quoting Chimel v. California, 395 U.S. 752, 763 (1969).

150. *See supra* notes 70-73 & 140 and accompanying text.

151. *See supra* text accompanying note 122.

152. *See supra* text accompanying notes 14-19.

terior compartments[153] and its emphasis on the practical considerations that justify a warrantless search.[154]

The *Ross* decision will promote expediency. A police officer who is prevented from conducting a warrantless search of containers found in the course of a probable cause search "would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain the warrant. . . . This process may take hours, removing the officer from his normal police duties."[155] *Ross* enables police officers to conduct an immediate container search without appearing before a magistrate if they have probable cause to believe that contraband is concealed in the vehicle.[156] Additionally, permitting warrantless searches should save the time involved in arresting a suspect and impounding his vehicle if the search proved fruitless.[157]

Undoubtedly, expediency and efficiency are legitimate concerns. "Expenditure of [police] time and effort [is] drawn from the public's limited resources for detecting or preventing crimes . . . ."[158] To the extent the *Ross* holding permits the police to make more effective use of their time, it is commendable. However, increased police effectiveness and expediency have been achieved in a costly fashion: the *Ross* decision substantially limits fourth amendment protection by eliminating the separation of powers between officer and magistrate.[159] In addition, the *Ross* expediency rationale is inconsistent with the Supreme Court's cautionary declaration that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."[160]

The *Ross* holding may be viewed in part as a response to criticism

153. *See supra* text accompanying note 41.

154. *See supra* notes 34-36 and accompanying text.

155. Robbins v. California, 453 U.S. at 433 (Powell, J., concurring).

156. 456 U.S. at 823-25.

157. If a police officer has probable cause to believe that a vehicle is transporting contraband, it is improbable that he would permit the car and its occupants to depart without examining containers found in the vehicle. Thus, if a police officer were unable to conduct a warrantless search of containers, he would be forced to arrest the occupants, seize the vehicle and its contents, and procure a search warrant. *Ross*, however, permits a police officer to conduct a warrantless search of containers. If the officer is satisified after searching a container that it contains no contraband, he is much more likely to release the car and its occupants, thereby saving the time involved in arresting the occupants and seizing the vehicle.

158. Robbins v. California, 453 U.S. at 433 (Powell, J., concurring).

159. *See supra* note 140 and accompanying text.

160. Mincey v. Arizona, 437 U.S. 385, 393 (1978); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971) (warrant requirement not an "inconvenience to be somehow 'weighed' against the claims of police efficiency.").

that search and seizure law has become too complex for law enforcement officers to understand and apply.[161] The majority attempted to end this confusion by announcing a "bright line" rule: police officers may search any container in which contraband may be secreted, as long as they have probable cause to believe the vehicle contains contraband and they do not know exactly which container conceals the contraband.[162]

The *Ross* majority's implementation of a mechanical rule is similar to the *Belton* Court's adoption of a "bright line" rule covering searches incident to arrest.[163] The trend established in these two cases reflects a belief that the security protected under the fourth amendment "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[164]

There are, however, negative aspects of the *Ross* Court's "bright line" rule. Important fourth amendment protections are stripped away by the blanket assumption that no container found during the lawful search of a vehicle is entitled to the protection afforded by the warrant process.[165] In addition, Chief Justice Burger has suggested that complex fourth amendment issues are not properly addressed through the adoption of "bright line" rules because "[w]e are construing the Constitution, not writing a statute or a manual for law enforcement officers."[166]

The *Ross* majority could have fashioned a "bright line" rule with-

161. The concurring opinions of Justice Blackmun and Justice Powell indicate that this concern was a primary factor in their willingness to join the majority's opinion. 456 U.S. at 825-26 (Blackmun, J., & Powell, J., concurring); *see supra* notes 53-56 and accompanying text.

162. 456 U.S. at 826. *See supra* text accompanying notes 28-29 & 47.

163. *See supra* notes 113-16 and accompanying text.

164. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142 (1974).

The failure to standardize rules in response to "every relevant shading of every relevant variation of every relevant complexity" results in "a fourth amendment with all the character and consistency of a Rorschach blot." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 375 (1974). The errors which police officers make when applying rules that are not clear-cut "will mean that many convictions will be overturned, highly relevant evidence . . . will be excluded, and guilty persons will be set free in return for little apparent gain in precise and clearly understood constitutional analysis." Arkansas v. Sanders, 442 U.S. at 772 (Blackmun, J., dissenting).

165. *See supra* note 140 and accompanying text.

166. Arkansas v. Sanders, 442 U.S. at 768 (Burger, C.J., concurring). By joining the majority in *Ross*, however, Chief Justice Burger possibly signaled a retreat from his earlier position taken in *Sanders*.

out weakening fourth amendment protection. If instead the majority had prohibited the warrantless opening of *any* container in the absence of exigent circumstances, it would have provided the police with a workable rule while maintaining the vitality of the warrant requirement.

F. The Ross *Court's Reconciliation of Its Holding with* Chadwick *and* Sanders

The majority's attempt to clarify search and seizure law through the creation of a "bright line" rule was undermined by its unsatisfactory effort to reconcile its holding with those in *Chadwick* and *Sanders*.[167] This reconciliation was necessary because the *Ross* decision upheld the warrantless search of a container found in an automobile whereas in *Chadwick* and *Sanders* the Court invalidated container searches conducted under similar conditions.

The *Ross* Court did not overrule the holdings in *Chadwick* and *Sanders*.[168] Under certain circumstances, *Chadwick* and *Sanders* will still prevent the warrantless search of a container found in an automobile. It appears, however, that warrantless searches will be prohibited only to the extent that they fall within the scope of the two justifications which supported the majority's attempted reconciliation of *Ross* with the two earlier cases. These two justifications are: (1) the absence in *Chadwick* and *Sanders* of probable cause to search more than a particular container; and (2) the presence in those cases of probable cause to search the containers before they were placed in the vehicles.[169] Because the arresting officers in *Ross* had probable cause to search the

167. 456 U.S. at 824; *see supra* note 52 and accompanying text.

168. *Id.*

169. The majority did not directly address these rationales when it upheld *Sanders*; however, its discussion of *Chadwick* and *Sanders* in an earlier part of the opinion suggests that these were the reasons why the warrantless searches in those cases were not permitted. Justice Stevens stated:

> The Arkansas Supreme Court ruled that the warrantless search of the suitcase [in *Sanders*] was impermissible under the Fourth Amendment, and this Court affirmed. As in *Chadwick*, the mere fact that the suitcase had been placed in the trunk of the vehicle did not render the automobile exception of *Carroll* applicable; the police had probable cause to seize the suitcase *before* it was placed in the trunk of the cab and did not have probable cause to search the taxi itself. . . . As THE CHIEF JUSTICE noted in his opinion concurring in [*Sanders*]:
>
> > 'Because the police officers had probable cause to believe that respondent's green suitcase contained marihuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under *United States v. Chadwick* . . . .
> >
> > . . . .
> >
> > Here, as in *Chadwick*, it was the *luggage* being transported . . . not the automobile . . . that was the suspected locus of the contraband.'

entire trunk and because probable cause to search did not exist before the containers were placed in the car, the majority was satisfied that it could uphold the warrantless search in *Ross* without disturbing the holdings in *Chadwick* and *Sanders*.

Justice Stevens' reconciliation of *Ross* with *Sanders* on the ground that there was probable cause to search the entire vehicle in *Ross*, but only the suitcase in *Sanders*, creates inconsistencies that are difficult to rationalize. As Justice Marshall observed, "why is [a container like the one in *Sanders*] more private, less difficult for police to seize and store, or in any other relevant respect more properly subject to the warrant requirement, than a container that police discover in a probable-cause search of an entire automobile?"[170]

This differentiation also places the Government in an awkward position. To validate a search, the Government must prove that "the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient knowledge to know exactly where the contraband was located."[171] This dual standard actually penalizes the officer for conducting a thorough investigation by limiting his ability to search once his information becomes sufficiently specific.[172] This standard might also encourage the officer to fabricate the information relied upon in order to avoid the necessity of obtaining a warrant when probable cause to search is limited to a particular container.

Reconciling *Ross* and *Sanders* on the basis that the police in *Sanders* had probable cause to search and seize the suitcase before it was placed in the vehicle, whereas the officers in *Ross* did not have probable cause to search the specific containers before the vehicle was stopped, also creates inconsistencies. First, the identical container receives completely different protection under marginally variant circumstances. Secondly, it presents the courts with the potentially difficult task of determining the point at which the investigating officers learned of the container's contents.[173] Finally, police officers might be willing

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Id. at 812-13 (quoting Arkansas v. Sanders, 442 U.S. at 766-67) (footnotes omitted) (emphasis added).

170. 456 U.S. at 839-40 (Marshall, J., dissenting).

171. United States v. Ross, 655 F.2d at 1201 (Wilkey, J., dissenting), *rev'd*, 456 U.S. 798 (1982).

172. In *Ross*, for example, if further investigation revealed that the contraband was located in a paper bag while the money received from narcotics sales was located in a red leather pouch, the police would have had probable cause to search only those two containers. With probable cause thus limited to specific containers, *Sanders* would have prohibited their immediate opening.

173. Justice Powell, concurring in *Robbins*, noted this possibility when he stated that

to manipulate the information relied upon in order to avoid the perils of a warrantless search like those conducted in *Sanders* and *Chadwick*.

Thus, in attempting to reconcile *Ross* with *Sanders* and *Chadwick*, the majority hampered its stated purpose of clarifying search and seizure law. Instead of eliminating confusion, the majority's attempted reconciliation penalizes police officers if their investigation is too thorough, encourages them to manipulate the information they relied upon, and causes identical containers to be treated differently under marginally different circumstances.

VI. CONCLUSION

The *Ross* Court's decision to overrule *Robbins* by permitting the warrantless search of containers is hardly surprising given the Court's decision to reconsider *Robbins* and not *Belton*.[174] The *Belton* "bright line" rule, which permits the warrantless search of any container in the car's interior, simply was at odds with the protection provided the same container under *Robbins*. The *Ross* decision resolved the *Robbins-Belton* dilemma[175] by implementing a rule for container searches under the automobile exception which gives the police approximately the same power to search as *Belton* provides for searches incident to arrest. Although the holding in *Ross* comports neatly with the decision in *Belton*, *Ross* undermined the vitality of the warrant requirement and basic fourth amendment protections by straying from the general principle that exceptions to the warrant requirement should be jealously guarded.

Most importantly, *Ross* signals the Court's perceived need to maintain the automobile exception and the power it bestows upon law enforcement despite the absence of the justifications which originally supported it. The automobile exception to the warrant clause has become an exception which no longer requires justification.

Perhaps Justice Powell, concurring in *Robbins*, envisioned the true virtue of *Ross* when he observed that "expanding the scope of the automobile exception is attractive not so much for its logical virtue, but because it may provide . . . an approach that would give more specific guidance to police and courts . . . ."[176] It is unfortunate that rights as

"courts may find themselves deciding when probable cause ripened . . . ." Robbins v. California, 453 U.S. at 435 (Powell, J., concurring).

174. *See supra* notes 111-20 and accompanying text.

175. *Id.*

176. Robbins v. California, 453 U.S. at 435 (Powell, J., concurring).

significant as those protected under the fourth amendment must succumb to expediency and anticipated clarity in the courts.

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